Supreme Court, U.S.
FILED

(1)

96 998 DEC 16 1996

No. ____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1996

RELIABLE BUSINESS COMPUTERS,
Petitioner,

v.

THERESA A. HEURTEBISE,
Respondent.

RECEIVED
HAND DELIVERED
DEC 18 1996
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

CHRISTOPHER R. HOLLIDAY (P39173)
JULIA SHERWIN (P50992)
Attorneys for Respondent
3000 Cadillac Tower
Detroit, Michigan 48226
(313) 965-0050

VERCRUYSSE METZ & MURRAY, P.C.
By: DIANE M. SOUBLY (P32005)
Counsel of Record
ROBERT M. VERCRUYSSE (P21810)
Attorneys for Petitioner
31780 Telegraph Road, Suite 200
Bingham Farms, Michigan 48025
(810) 540-8019

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

40 pp

QUESTIONS PRESENTED

I.

WHETHER THE MICHIGAN SUPREME COURT'S DECISION IN *HEURTEBISE* v *RELIABLE BUSINESS COMPUTERS, INC*, SUPREME COURT NO. 102109 (RELEASED ON JUNE 16, 1996 AND REHEARING DENIED BY ORDER DATED SEPTEMBER 16, 1996) (THE "*HEURTEBISE* DECISION"), SHOULD BE VACATED BECAUSE IT IS STATE DECISIONAL LAW WHICH IS CONFLICT PRE-EMPTED BY THE FEDERAL ARBITRATION ACT ("FAA"), 9 USC § 1 *ET SEQ.*, UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, WHERE THAT COURT'S HOLDING WAS INCONSISTENT WITH THE NATIONAL POLICIES FAVORING THE ENFORCEMENT OF ARBITRATION AGREEMENTS EVEN AS TO CIVIL RIGHTS CLAIMS, AS EMBODIED IN THE FAA AND IN FEDERAL DECISIONS RECOGNIZING THE QUASI-JUDICIAL CHARACTER OF THE ARBITRAL/ADR FORUM AND HOLDING THAT SUCH ARBITRATION/ADR AGREEMENTS WAIVE NO SUBSTANTIVE RIGHTS?

II.

WHETHER THE MICHIGAN SUPREME COURT'S *HEURTEBISE* DECISION REFUSING TO ENFORCE THE ARBITRATION AGREEMENT OF THE PARTIES SHOULD BE VACATED BECAUSE IT HOLDS FORMATION OF AN ARBITRATION AGREEMENT TO DIFFERENT AND HIGHER STANDARDS THAN EMPLOYMENT CONTRACT FORMATION GENERALLY UNDER MICHIGAN LAW?

III.

WHETHER THE MICHIGAN SUPREME COURT'S *HEURTEBISE* DECISION REFUSING TO ENFORCE THE PARTIES' ARBITRATION AGREEMENT SHOULD BE VACATED ON FEDERAL CONSTITUTIONAL GROUNDS BECAUSE IT IMPAIRS THE CONTRACT ENTERED INTO BY THE PARTIES, U.S. CONST., ART. I, § 10, AND/OR BECAUSE IT DISCRIMINATES AGAINST EMPLOYERS IN THE FORMATION OF EMPLOYMENT AGREEMENTS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION, U.S. CONST., AMD. XIV, § 1?

LIST OF PARTIES

Petitioner is Reliable Business Computers, Inc., a corporation with no parent company or wholly owned subsidiaries.

Respondent is an individual, Theresa A. Heurtebise.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE:

A. Violation Of Law And Rules Below 1

B. Arbitration Agreement Below 3

C. Decisions Below 4

D. Contract Impairment And Uncertainty 6

SUMMARY OF REASONS FOR GRANTING THE WRIT 7

REASONS FOR GRANTING THE WRIT 9

I. UNDER THE DOCTRINE OF CONFLICT PREEMPTION THE FAA PREEMPTS MICHIGAN'S RESTRICTION ON FORMATION AND ENFORCEMENT OF ARBITRATION AGREEMENTS. 11

A. The FAA Preempts State-Imposed Judicial Proceedings. 11

B. The FAA Compels Arbitration Of Plaintiff's Claim. 15

II. THE MICHIGAN DECISION MUST BE VACATED BECAUSE IT CONTRADICTS PRINCIPLES OF ARBITRATION AGREEMENT FORMATION UNDER MICHIGAN STATUTORY LAW. 21

III. THE *HEURTEBISE* DECISION CONTRADICTS MICHIGAN COMMON-LAW PRINCIPLES OF EMPLOYMENT CONTRACT FORMATION AND MUST BE VACATED AS CONFLICT PREEMPTED. 23

PAGE

IV. THE MICHIGAN SUPREME COURT DECISION IMPAIRS CONTRACTS AND DENIES EMPLOYERS EQUAL PROTECTION. 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES:

Alford v *Dean Witter Reynolds Inc*, 939 F2d 229 (CA 5, 1991) 19

Allied-Bruce Terminix Companies, Inc v *Dobson*, 115 S Ct 834 (1995) 8, 12, 13, 16, 27, 30

Allied Structural Steel Co v *Spannaus, Minn.*, 438 US 234 (1978) 28

Batchelor v *Sears, Roebuck & Co*, 574 F Supp 1480 (ED Mich 1983) 27

Bender v *A G Edwards & Sons, Inc*, 971 F2d 698 (CA 11, 1992) 19

Benefits Communications Corp v *Klieforth*, 642 A2d 1299 (DC Cir 1994) 19

Breish v *Ring Screw Works*, 397 Mich 586; 248 NW2d 526 (1976) 25

Carlson v *Hutzel Corporation of Michigan*, 183 Mich App 508; 455 NW2d 335 (1990); lv den (1991) 24-25

Christy v *Kelly*, 198 Mich App 215; 497 NW2d 194 (1992) 22, 26

Corion Corp v *Chen*, 964 F2d 55 (CA 1, 1992) 19

Crawford v *West Jersey Health Systems*, 847 F Supp 1232 (D NJ 1994) 20

DAIIE v *Gavin*, 416 Mich 407; 331 NW2d 418 (1982) 22

PAGE

Dancu v *Coopers & Lybrand*, 778 F Supp 832 (ED Pa 1991) *aff'd*, 972 F2d 1330 (CA 3, 1992) 20

Dahlman v *Oakland University*, 172 Mich App 502; 432 NW2d 304 (1988) 25

Degaetano v *Smith Barney, Inc*, 1996 WL 4426 (S.D. N.Y. 2/5/96) 18, 19

Detroit United Railway v *Michigan*, 242 US 238 (1916) .. 28

DiCrisci v *Lyndon Guar Bank of New*, 807 F Supp 947 (WD NY 1992) 20

Didonato v *AG Edwards & Sons Inc*, 65 FEP Cases (BNA) 1207 (ND Cal 1994) 19

Doctor's Associates, Inc v *Lombardi*, 64 USLW 4370 (1996) 8, 10, 11, 30

Edwards v *ITT Financial Services*, 65 FEP Cases (BNA) 543 (ND Cal 1993) 20

EE Tripp Excavating Contractor, Inc v *Jackson County*, 60 Mich App 221, 236-237; 230 NW2d 556 (1975) 22

Ehresman v *Bultynck & Co*, 302 Mich App 350; 511 NW2d 724 (1994) 23

FJ Siller Co v *City of Hart*, 400 Mich 578; 255 NW2d 347 (1977) 25

Fletcher v *Kidder Peabody & Co*, 81 NY 2d 623, 619 NE2d 998, 601 NYS 2d 686, *cert. den.*, 114 S Ct 554, 126 L Ed 2d 455 (1993) 20

Fulghum v *United Parcel Service*, 424 Mich 89; 378 NW2d 472 (1986) 25

Gilmer v *Interstate/Johnson Lane Securities*, 500 US 20 (1991) 2, 6, 7, 10, 15, 16, 17, 19

Gordon Sel-Way v *Spence Bros*, 438 Mich 488; 475 NW2d 704 (1991) 22

PAGE

Harrison v *Salomon Bros Inc*, 156 Misc 2d 341, 593 NYS 2d 439 (1992) 20

Hull v *NCR Corp*, 826 F Supp 303 (ED Mo 1993) 20

In re Certified Question, 432 Mich 438; 443 NW2d 112 (1989) 24

Kauffman v *The Chicago Corp*, 187 Mich App 284; 466 NW2d 726 (1991), *app den*, 439 Mich 944 (1992) 14

Lockhart v *AG Edwards & Sons*, 65 FEP Cases (BNA) 5 (D Kan 1994) 19-20

Mago v *Shearson Lehman Hutton, Inc*, 956 F2d 932 (CA 9, 1992) 19

Mastrobuono v *Shearson Lehman Hutton, Inc*, 115 S Ct 1212 (1995) 8

Metropolitan Life Ins Co v *Ward*, 470 US 869 (1985) 28

Mitsubishi Motors Corp v *Soler Chrysler-Plymouth, Inc*, 473 US 614, 105 S Ct 3346, 87 L Ed 2d 444 (1985) 15

Myers v *Western Southern Life Ins Co*, 849 F2d 259 (CA 6, 1988) 26

Nazon v *Shearson Lehman Bros Inc*, 832 F Supp 1540 (SD Fla 1993) 20

Nghiem v *NEC Electronic Inc*, 25 F3d 1437 (CA 9, 1994) 17-18

Northland Ins Co v *Sny*, 98 Mich App 507; 296 NW2d 292 (1980) 21

Perry v *Thomas*, 482 US 483, 107 S Ct 2520, 96 L Ed 2d 426 (1987) 8, 10, 15, 30

Prima Paint Corp v *Flood & Conklin Manuf Co*, 338 US 395 (1967) 10-11, 30

PAGE

Prudential v *Lai*, 42 F3d 1299 (CA 9, 1994) 18, 19

Reid v *Sears, Roebuck and Co*, 790 F2d 453 (CA 6, 1986) 22, 26

Renny v *Port Huron Hospital*, 427 Mich 415; 398 NW2d 327 (1986) 24, 25, 26, 28

Riley v *State Farm Auto Ins Co*, 420 F2d 1372 (CA 6, 1970) *cert den*, 339 US 928, 90 S Ct 2245 26 L Ed 2d 795 (1971) 21

Rushton v *Meijer, Inc*, Michigan Supreme Court Docket No. 102466 6

Ryoti v *Paine, Webber*, 142 Mich App 805 (1985) 26

S+L+H SPA v *Miller-St Nazianz, Inc*, 988 F2d 1518 (CA 7, 1993) 15

Saari v *Smith Barney. Harris Upham & Co, Inc*, 968 F2d 877 (CA 9, 1992) 15, 17

Scanlon v *P&J Enterprises*, 182 Mich App 347; 451 NW2d 616 (1990) 15

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) 30

Scholz v *Montgomery Ward, Inc*, 437 Mich 83; 468 NW2d 845 (1991) 22, 23, 26, 27

Scott v *Farm Family Life Insurance Co*, 827 F Supp 76 (D Mass 1993) 20

Shearson/American Express, Inc v *McMahon*, 428 US 226, 107 S Ct 2332, 96 L Ed 2d 187 (1987) 7, 15

Southland Corp v *Keating*, 465 US 1, 104 S Ct 852, 79 L Ed 2d 1 (1984) 8, 10, 12, 13, 30

Sponseller v *Kimball*, 246 Mich 255; 224 NW 359 (1929) 22, 26

Sprague v *General Motors*, 92 F3d 1425 (CA 6, 1996) 6

Toussaint v *Blue Cross and Blue Shield of Michigan*, 408 Mich 579 (1980) 24

PAGE

Vander Toorn v *City of Grand Rapids*, 132 Mich App 590; 348 NW2d 697 (1984), app den 25

Volt Information Sciences, Inc. v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 US 468, 109 S.Ct. 1248, 103 L Ed 2d 488 (1989) 10, 30

Williams v *Katten, Muchin & Zavis*, 837 F Supp 1430 (ND Ill 1993) 20

Zeniuk v *RKA Inc*, 189 Mich App 33; 472 NW2d 23 (1991) 25

UNITED STATES CONSTITUTION:

Art I, § 10 28

Amd. XIV, § 1 28

STATUTES AND RULES:

9 USC § 1 ..... *passim*

9 USC § 2 ..... *passim*

MCL § 37.2101 4

MCL § 566.1 23

MCL § 600.5001 21

MCL § 600.5001(1) 22

MCL § 600.5001(2) 22, 23

MCL § 600.5035 16

MCR 2.116(G)(4) 2

MCR 2.116(H) 3

OTHER AUTHORITY:

Restatement Contracts 2d, § 30, § 50(b), § 53(2) 26-27

No. _____

In The

Supreme Court of the United States

October Term, 1996

RELIABLE BUSINESS COMPUTERS,
Petitioner,

v.

THERESA A. HEURTEBISE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

OPINIONS BELOW

The opinion of the Michigan Supreme Court is to be reported at ___ Mich. ___ (1996) (Docket No. 102109) and is reproduced at pp. A-2–A-34 of the separately-bound Appendix to the Petition for a Writ of Certiorari ["App."]. The order denying petitioner Reliable Business Computer, Inc.'s ("Reliable" or the "Company") motion for rehearing is reproduced at App. p. A-1. The Court of Appeals Opinio below, reported at 207 Mich. App. 308 (1995), is reproduced at App. pp. A-35–A-37.

JURISDICTION

This petition is timely filed within 90 days of the Michigan Supreme Court's September 16, 1996 Order denying Reliable's timely filed motion for rehearing seeking to vacate the court's plenary opinion issued on June 16, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mich. Const. 1963, Art. 1, § 14; Mich. State Fair Employment Practices Act and Elliott-Larsen Civil Rights Act; Title 9, U.S.C. §§ 1-2; U.S. Const., Art. I, § 10; and U.S. Const., Amd. XIV, § 1, are reproduced at App. pp. A-71–A-112.

STATEMENT OF THE CASE

A. Violation Of Law And Rules Below

This case arises from the refusal of the Michigan Supreme Court to enforce an agreement between an employer and employee to arbitrate their employment disputes which might result in monetary damages.

The court reached that result by singling out arbitration provisions for suspect status, requiring greater information or choice in the formation of an agreement to arbitrate than it had over the last fifteen years for the formation of any other implied-in-fact employment agreement. The court also chose to ignore the express written agreement under which Heurtebise expressly agreed to abide by present and future employer policies and procedures contained in employee handbooks, including an arbitration procedure.

The Michigan Supreme Court violated its own court rules on motion practice and failed to follow its own precedents delineating employment contract formation in its rush to invalidate an arbitration agreement compelling the arbitration of civil rights claims. Four of the seven justices refused to join in Part III of the Opinion of the Court, which claimed, disingenuously, that Reliable had not raised the issue that the arbitration provision should be enforced under clear precedents from this Court enforcing § 2 of the FAA [App. p. A-111], when in fact almost half of petitioner's principal brief on appeal addressed *Gilmer* v *Interstate/Johnson Lane Securities*, 500 US 20 (1991) and its progeny [App. pp. A-38–A-61]. The minority Opinion (Part III) also strained, again disingenuously, to articulate a purported separate and independent state ground under the state constitutional provisions recognizing civil rights and preserving jury trials in cases in which jury trials were permitted at the time of the passage of the state constitution in 1963 [App. p. A-71], even though Heurtebise never brought a gender discrimination claim under the state constitution (which did and does not recognize gender as a protected status), but instead brought a statutory claim under a civil rights statute passed a decade *after* the ratification of the state constitution [App. pp. A-86–A-110] and succeeding a civil rights statute which provided a judicial forum only to review an agency determination on the merits and which did not recognize gender as a protected status [App. pp. A-72–A-85].

Perhaps nothing demonstrates the Michigan Supreme Court's determination to vitiate the arbitration agreement of the parties more than its decision to violate its own court rules by allowing plaintiff to supplement the record for the first time before that court. Contrary to the requirements of Michigan Court Rule 2.116(G)(4), plaintiff did not submit any affidavit or any other factual evidence on the issue of whether the agreement was knowing and voluntary in opposition to the Company's dispositive motion before the trial court, which the Company supported with record evidence outside the Complaint. The Supreme Court allowed plaintiff to introduce the entire employee handbook, without an affidavit from plaintiff herself to support the allegation that she had somehow "lost" the handbook before the dispositive motion hearing — a claim made for the first

time in the Supreme Court, and not even raised in either lower court by way of an affidavit describing why a contrary record showing could not be made under Michigan Court Rule 2.116(H). As Reliable pointed out in its response to plaintiff's motion to supplement the record, plaintiff's counsel had a complete copy of the entire handbook at all times and could have supplied it before the trial, but did not.

B. Arbitration Agreement Below

In May 1989, the Company hired Heurtebise as an "at will" employee to work at its Livonia, Michigan office. Prior to beginning her employment, Heurtebise received a copy of an employee handbook containing, *inter alia*, an arbitration procedure. Although the Michigan Supreme Court relegated her express written agreement to a footnote, Heurtebise in fact signed a written acknowledgment that confirmed both her receipt of the handbook and her voluntary agreement to conform to its terms:

> "I acknowledge receipt of the Reliable Business Computers, Inc. Employee Handbook. *I agree to conform to the various procedures, rules and regulations of the company, as set forth therein, and as may be promulgated by the company in the future*, and further understand that my employment and compensation can be terminated with, or without cause, and with or without notice at any time, at the option of either me or the company. I further understand that no employee, other than the President or his designee, in a duly executed written document, has any authority to enter into any agreement for employment for any specified period of time, *or to make any arrangements contrary to or different from what is provided in this Handbook*."

[App. p. A-62; emphasis added].

The arbitration procedure in the handbook requires all employment-related and other monetary disputes coming within its scope to be arbitrated before the American Arbitration Association ("AAA") [App. pp. A-65–A-66]. The arbitration procedure also contains a limited exception permitting either party to institute a circuit court action for equitable relief for the sole purpose of preventing immediate and irreparable harm and injury [*Id.*].

After the Company terminated Heurtebise's employment for violating an express employment rule, she bypassed the arbitration agreement altogether and filed a complaint in circuit court seeking monetary damages for alleged gender discrimination in violation of the Michigan Civil Rights Act, MCL § 37.2101 *et seq.* Respondent's complaint alleged that she was disparately disciplined for the same offense than a male employee. [Complaint ¶¶ 13-15, 19]. At no time did Heurtebise request either internal review of her termination or arbitration of her monetary damage claim, as required by the handbook arbitration clause.

In response to the complaint, on or about December 19, 1991, the Company filed a motion to dismiss or alternatively to compel arbitration and stay proceedings, based on Heurtebise's express agreement to abide by any and all employer policies and procedures, including the arbitration provision in the handbook requiring her to arbitrate all money damages claims sought as a result of any employment dispute under the broad arbitration clause.

C. Decisions Below

At the hearing on Reliable's motion to compel arbitration, the trial court denied the motion from the bench on the ground that such an agreement to arbitrate civil rights claims violated public policy. The trial court also found that the provision affording a judicial forum for equitable relief rendered the arbitration provision ambiguous:

> "An ambiguity is always received in opposition to the drafter of the contract and in this particular case the Court would find that these parties did not have a meeting of the minds relative to an agreement to arbitrate issues arising out of the Elliott-Larsen Civil Rights Act and the motion will be denied."

Reliable sought and obtained interlocutory leave to appeal in the Court of Appeals, which was granted on September 18, 1992. In its brief to the Court of Appeals, Reliable raised and addressed the issue that agreements to arbitrate are enforceable under § 2 of the FAA and cited federal cases from this

Court and the federal circuit courts in support of enforcement of arbitration agreements, even as to civil rights claims.

On October 17, 1994, the Court of Appeals entered its opinion and decision reversing the trial court [App. pp. A-35–A-37]. The Court of Appeals correctly decided:

1) The Reliable arbitration procedure is not ambiguous: "The provision requiring arbitration is not ambiguous. The clause plainly states that claims for money damages must be submitted to arbitration;"

2) To be enforceable, an arbitration agreement does not have to be a separate document or separately signed by the parties;

3) Heurtebise expressly accepted the handbook's provisions which include arbitration: "The trial court appears to have denied defendant's motion in part because it found there was no 'meeting of the minds' between plaintiff and defendant which regard to the arbitration clause. The record does not support such a finding;"

4) Provisions of an employment handbook give rise to an enforceable arbitration contract: "Even were the record devoid of plaintiff's express acceptance of the handbook's provisions, it is well established under Michigan law that mutual assent to a term of employment is not required;"

5) Public policy in Michigan favors arbitration of disputes: "We find no 'public policy' prohibition against the enforcement of a valid arbitration agreement that provides for meaningful arbitration in matters involving civil rights questions;"

6) Arbitration does not result in the loss of substantive statutory rights: "Contrary to plaintiff's suggestion, arbitration of plaintiff's claims will not result in the loss of her rights under the Civil Rights Act. . . . ;" and

7) The Reliable procedure provides for meaningful arbitration of Heurtebise's statutory claims because it meets all requirements for elementary fairness.

Reliable and its amici requested that the Michigan Supreme Court affirm the Court of Appeals decision and enforce Heurtebise's express written agreement to abide by all employer policies and procedures including arbitration of money damage disputes under Michigan statutory arbitration law, under Michigan common-law employment contract principles, and as consistent with the FAA as construed in *Gilmer*, *supra*, and its progeny. Four of the justices concurred separately because they declined to join the lengthy Part III of the opinion essentially confusing forum selection with a substantive right and inexplicably failing to reach the threshold issue of whether the arbitration agreement should be enforced under the FAA. Reliable takes great issue with the cavalier statement in the minority Part III that it never raised the issue of the impact of the FAA. Almost half of its principal brief on appeal addressed the issue of whether the agreement in issue should be enforced as consistent with the FAA and federal decisions under that statute [App. pp. A-38–A-61]. Without addressing that issue, and in a manner contrary to its own prior case law or employment contract formation, the justices concluded that an at-will disclaimer and a reservation of rights clause (required for summary plan descriptions of ERISA-governed benefits under recent Sixth Circuit case law, see, *e.g.*, *Sprague* v *General Motors*, 92 F3d 1425 (CA 6, 1996)) vitiated the enforceability of any handbook provision and evinced an employer intent not to be bound by the provisions, even though Heurtebise had received compensation and benefits under and had performed under its terms.

From that decision Reliable appeals to this Court.

D. Contract Impairment And Uncertainty

In a related case which the Michigan Supreme Court held in abeyance and then remanded in light of its decision for *Heurtebise* (*Rushton* v *Meijer, Inc*, Supreme Court Docket No. 102466) a self-authenticating affidavit submitted by the employer demonstrates that employers submitting to ADR procedures may have their decisions reversed by arbitrators and must abide by that result [App. pp. A-67–A-70, Riddle Aff., ¶ 9]; that a significant number of employment disputes are resolved

by settlement agreements without trial (and without the costs and administrative time expended by bench and litigants alike in trial) [*Id.*, ¶¶ 12-13]; and that where employers have had such procedures in place, as Meijer has had for a decade, then any decision by the Michigan Supreme Court invalidating such procedures retroactively causes grave uncertainties and potential exposure for all Michigan employers who entered into settlement agreements under such procedures in good faith and raises the spectre of increased litigation [*Id.*, ¶¶ 10-13].

SUMMARY OF REASONS FOR GRANTING THE WRIT

As this Court recognized almost a decade ago, a jaundiced view of arbitration of statutory claims including civil rights claims no longer persists:

> "[W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals should inhibit enforcement of the [Arbitration] Act 'in controversies based on statutes.'" (Quoting *Mitsubishi Motors Corp* v *Soler Chrysler-Plymouth, Inc* 473 US 614, 626-27, 105 S. Ct. 3346, 3354, 87 L.Ed.2d 444 (1985)).

Shearson/American Express, Inc v *McMahon*, 482 US 220, 226, 107 S Ct 2332, 2337, 96 L Ed 2d 187 (1987). Notwithstanding the failure of a majority of justices of the Michigan Supreme Court to address the issue of whether the agreement should be enforced as consistent with the FAA, and notwithstanding the claim of three Justices of the court that this case did not "arise under" the Federal Arbitration Act, 9 U.S.C. § 2 (the "FAA"), the Company spent almost half of its principal brief discussing the clear precedent established by this Court: that a forum selection clause is enforceable as an arbitration agreement under the FAA and does not constitute a waiver of statutory or constitutional rights, even where a civil rights statute describes a judicial procedure for enforcement. *Gilmer, supra.*

Plaintiff offered *no* record evidence below to demonstrate that her express written agreement to abide by all present and

future employer policies and procedures (including an arbitration provision) was anything but knowing and voluntary.

The decision of the Michigan Supreme Court invalidating Heurtebise's agreement to abide by all employer procedures including arbitration must be preempted under the Supremacy Clause as in conflict with national policies favoring enforcement of arbitration agreements and favoring the resolution of individual statutory civil rights claims in the quasi-judicial forum of arbitration/ADR. In 1995, in *Allied-Bruce Terminix Companies, Inc* v *Dobson*, 115 S Ct 834 (1995), and *Mastrobuono* v *Shearson Lehman Hutton, Inc*, 115 S Ct 1212 (1995), as it had years earlier in *Southland Corp* v *Keating*, 465 US 1, 104 S Ct 852, 79 L Ed 2d 1 (1984) and *Perry* v *Thomas*, 482 US 483, 107 S Ct 2520, 96 L Ed 2d 426 (1987), this Court reaffirmed its earlier conclusions that state courts must apply the Federal Arbitration Act, 9 USC § 1 *et seq.* (the "FAA"), in actions involving agreements to arbitrate where there are activities "affecting commerce" between non-diverse defendants. As this Court has repeatedly held, the FAA preempts conflicting state anti-arbitration laws requiring judicial resolution of disputes. Furthermore, this Court has held that Congress did not intend federal and state courts to reach different outcomes about the validity of arbitration in similar cases.

Because the Michigan Supreme Court held an agreement to arbitration up to a higher standard of contract formation than it has for years required of employment contracts generally, its decision in *Heurtebise* v. *Reliance Business Computers, Inc.* is in direct conflict with all of the above-listed decisions of this Court, as well as its most recent pronouncement in *Doctor's Associates, Inc.* v. *Lombardi*, 64 USLW 4370, 4372 (1996):

> "Courts may not, however, invalidate arbitration agreements under state laws applicable, only to arbitration provisions. See *Allied-Bruce* 513 U.S., at __ (slip op., at 15); *Perry*, 482 U.S., at 493, n. 9. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' *Scherk* v. *Alberto-*

> *Culver Co.*, 417 U.S. 506, 511 (1974) (internal quotation marks omitted). Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act. See 2 I. Macneil, R. Speidel, T.Stipanowich, & G. Shell, Federal Arbitration Law § 19.1.1, pp. 19:4-19:5 (under *Southland* and *Perry*, 'state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted')."

The court's refusal to enforce the parties' arbitration agreement impaired Reliable's employment agreements with Heurtebise and all of its employees and discriminated against it in the formation of contracts by failing to enforce an arbitration provision arising in the same manner as provisions favorable to employees.

REASONS FOR GRANTING THE WRIT

In a state-law decision that should be vacated under the Supremacy Clause of the U.S. Constitution, given its conflict with the FAA and federal precedent, the Michigan Supreme Court refused to enforce Heurtebise's written agreement that she would abide by employer policies and procedures, including but not limited to an arbitration provision in the employee handbook, simply because she asserted an employment discrimination claim under a state statute.

As Reliable and its amici contended before the Michigan Supreme Court, Heurtebise's express written agreement to abide by all policies and procedures of the employer included the arbitration provision in the employee handbook. That provision required Heurtebise to arbitrate all money damages employment related claims, without any exclusion for civil rights claims. Reliable contended below, successfully

before the Michigan Court of Appeals but unsuccessfully before the Michigan Supreme Court, that the agreement should be enforced as consistent with the FAA, which preempts any state judicial proceeding in conflict with the national policy favoring arbitration/ADR of employment disputes. To find otherwise in a jurisdiction where the Sixth Circuit has also extended the reach of the FAA to employment discrimination disputes (employing the analysis followed by most of the federal circuits) would contravene the principle that Congress intended that, for purposes of enforcing arbitration agreements, federal and state courts would treat similar cases in a similar manner.

Under the FAA, Heurtebise's written agreement should be enforced, particularly where the employee handbook which she received when she was hired clearly spelled out that *all* employment disputes over money damages would be subject to the arbitration provision; where she is presumed by law to have read what she agreed to and to be negligent if she has failed to make any inquiry about any contents of the handbook which she did not understand; and where, after signing the written acknowledgment, plaintiff decided to become employed and continued in the Company's employ, all the while receiving benefits under the handbook, only one provision of which she sought to repudiate: the arbitration provision.

The decision of the Michigan Supreme Court singles out arbitration provisions of statutory claims as a suspect class, holds such provisions to a higher standard of contract formation that employment contracts in general, and runs contrary to the Court's own prior decisions on enforcing handbook provisions even where an employee expressly refused to abide by and/or with the provision or claimed that [s]he had not mutually assented to the provision. Such a decision violates clear precedent articulated in this Court, *Doctor's Associates, Inc* v *Lombardi, supra*; *Gilmer, supra*; *Volt Information Sciences, Inc* v *Board of Trustees of Leland Stanford Junior Univ.*, 489 US 468 (1989); *Perry* v *Thomas*, 482 US 483 (1987); *Southland Corp* v *Keating*, 465 US 1 (1984); *Prima Paint Corp* v *Flood & Conklin*

Manuf Co, 338 US 395 (1967). The FAA displaces contrary state law, whether decisional or statutory, with respect to arbitration agreements within its ambit. *Doctor's Associates*, 64 USLW at 4372. Thus, petitioner contends that the Michigan Supreme Court decision in *Heurtebise* should be vacated.

Vacating that decision, to which the state supreme court declined to give only prospective effect as requested by Reliable and its amici, will avoid the impairment of employment contracts containing arbitration provisions under which employment disputes have been or could have been arbitrated by Reliable and other employers. Vacating that decision will also avert the constitutional violation of according less than equal protection to one party's attempts, on a record devoid of fraud, duress or adhesion, to form an employment agreement to arbitrate.

I.

UNDER THE DOCTRINE OF CONFLICT PREEMPTION THE FAA PREEMPTS MICHIGAN'S RESTRICTION ON FORMATION AND ENFORCEMENT OF ARBITRATION AGREEMENTS.

Despite clear federal precedent otherwise, below and presumably in response to this petition for review, Heurtebise will proceed from the non-evident premise that she is "entitled" to a judicial proceeding as a substantive statutory right under the Michigan Civil Rights Act or as an "absolute" constitutional right.

Assuming *arguendo* that such a right to jury trial exists, such "rights" to a jury trial afforded under state law are preempted under the federal Supremacy Clause, even for statutory civil rights claims and even where arbitration/ADR is unilaterally imposed by the employer as a condition of employment. State courts must effectuate national policies under the FAA favoring arbitration of employment disputes in actions arising out of activities affecting interstate commerce.

A. The FAA Preempts State-Imposed Judicial Proceedings

This Court has affirmed that state courts must apply the FAA in state-court disputes, and that state courts may not

enforce state judicial proceedings in contravention of arbitration provisions within the ambit of the FAA. State statutes and decisional law which conflict with the purposes of the FAA by providing that arbitral/ADR proceedings cannot be substituted for judicial proceedings are thus preempted.

1.

In *Southland Corp* v *Keating*, 465 US at 11-16, this Court recognized two purposes of the FAA:

> "(1) [I]n enacting the Federal Arbitration Act, Congress intended to overcome the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements *and to foreclose state legislative attempts to undercut the enforceability of arbitration agreements*;
>
> (2) The Federal Arbitration Act achieves the federal public policy favoring arbitration of disputes by *ousting the states from jurisdiction to provide a judicial forum for the resolution of claims which parties have expressly agreed to arbitrate, so that any state statute which frustrates the purpose of the Act violates the Federal Supremacy Clause and is therefore preempted [in the application] under the doctrine of conflict preemption.*"

[Emphasis added.]

Noting that Congress intended the FAA to unseat the deep-rooted hostility of the courts towards arbitration (as a sort of territorial response by courts seeking to extend their jurisdiction), this Court again recently concluded that state anti-arbitration provisions could not survive conflict preemption under the FAA. *Allied-Bruce Terminix Companies, Inc* v *Dobson*, 115 S Ct 834, 838-839 (1995). In *Allied-Bruce*, this Court determined that a state does not remain free to apply its anti-arbitration law or policy to frustrate the national policy of enforcing agreements to arbitrate disputes arising out of activities involving (*i.e.*, "affecting") commerce. As even the concurring opinion recog-

nized, any contrary holding would foster pre-arbitration litigation over the intent of the parties, hearings which would frustrate the very purpose of the Act.[1]

While the *Allied-Bruce* Court opined that a state could protect against unfair pressure to agree to an arbitration provision through general contract law principles, it *cautioned that a state could not enforce the other terms of a contract, but then invalidate the arbitration provision:*

> "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress's intent. See *Volt Information Sciences, Inc.* [v. *Board of Trustees of Leland Stanford Junior Univ.*], 489 US [468] at 474[;] 109 S.Ct. [1248] at 1253[;] [103 L Ed 2d 488] (1989)."

So, here, Heurtebise in essence retained the benefits of the terms and conditions of employment delineated in the employee handbook, but asked the Michigan Supreme Court to invalidate a single provision: the arbitration provision. As that Court was warned by Amici Curiæ American Society of Employers, American Automobile Manufacturers Association, Michigan Chamber of Commerce and Greater Detroit Chamber of Commerce, any state court decision fashioning a state policy

---

1 **Interestingly, Justice O'Connor, who had dissented in the *Southland Corp* v *Keating* decision on the ground that Congress did not intend the FAA to apply in state courts, joined the result in *Allied-Bruce* and noted in her concurrence that, because of reliance upon the *Keating* holding over the last decade by parties to arbitration agreements, the case should not be overruled by the Court.**

to vitiate an arbitration provision while enforcing other terms and conditions of the employment relationship would be preempted by federal law under the doctrine of conflict preemption. Nevertheless, the state supreme court remanded the case to a judicial forum, allowing plaintiff to seek back and front pay damages based upon her previously paid level of compensation, and/or to seek reinstatement based upon the existence of an employment agreement evidenced by the handbook whose arbitration provision she seeks to avoid. In so doing, the court allowed her to enforce all aspects of her employment agreement save one.

Michigan appellate courts have also recognized that the FAA applies in state court proceedings and precludes, where it is applicable, state judicial proceedings. *Kauffman* v *The Chicago Corp*, 187 Mich App 284; 466 NW2d 726 (1991), *app den*, 439 Mich 944 (1992). In *Kauffman*, despite her agreement to submit any employment dispute to arbitration pursuant to the rules of the New York Stock Exchange, plaintiff filed a civil action alleging wrongful discharge, defamation, and breach of employment contract. The Court of Appeals held that, pursuant to the national policy favoring arbitration embodied in the FAA, plaintiff's claims must be arbitrated:

> "The Federal Arbitration, 9 USC 1-15, governs actions in both federal and state courts arising out of contracts involving interstate commerce. *Southland Corp* v *Keating*, 465 US 1; 104 S Ct 852; 79 L Ed 2d 1 (1984); *Scanlon* v *P&J Enterprises*, 182 Mich App 347; 451 NW2d 616 (1990). More specifically, disputes between a member of a national stock exchange and its employees are within the federal act is there is a binding arbitration. *Coenen* v *R W Pressprich & Co*, 453 F2d 1209 (CA 2, 1972). States courts are bound under the supremacy clause, U.S. Constitution, Article VI, at 2, to enforce the substantive provisions of the federal act. *Scanlon, supra*."

Kauffman, 187 Mich App at 288.

As enforced through the Supremacy Clause, the FAA thus prohibits state legislatures and judiciaries from mandating a judicial forum where the parties have agreed to an arbitral/ADR

forum for the resolution of disputes relating to contracts or agreements affecting interstate commerce.

2.

This Court has also held that the duty imposed upon federal and state courts under the national policy favoring arbitration of disputes "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express, Inc* v *McMahon*, 482 US at 226, 107 S Ct at 2337; *Mitsubishi Motors Corp* v *Soler Chrysler-Plymouth Inc*, 473 US 614, 626-27, 105 S Ct 3346, 3354, 87 L Ed 2d 444 (1985). So, in *Perry* v *Thomas*, 482 US at 491 (1987), the Supreme Court held that a state statute providing a judicial forum for a wage or commission claim based on the sale of securities conflicted with the purposes of the FAA and was preempted. See, *e.g.*, *S+L+H SPA* v *Miller-St Nazianz, Inc*, 988 F2d 1518 (CA 7, 1993) (holding that state Fair Dealership Law preempted insofar as it might mandate a judicial proceeding); *Saari* v *Smith Barney, Harris Upham & Co, Inc*, 968 F2d 877 (CA 9, 1992) (claim under state polygraph protection act held subject to arbitration).

The Michigan Court of Appeals has also recognized that the FAA preempts state statutory judicial proceedings where the parties have agreed to arbitrate. In *Scanlon* v *P&J Enterprises*, 182 Mich App 347, 350-351; 451 NW2d 616 (1990), the Michigan Court of Appeals correctly held that, given the preemptive force of and national policy embodied in the FAA, any claim which the parties have agreed to arbitrate, *including a statutory claim* (there under the Michigan Franchise Investment Law), is properly submitted to an arbitral forum, rather than a judicial proceeding.

B. The FAA Compels Arbitration Of Plaintiff's Claim.

Absent a legislative intent to preclude a waiver of judicial remedies for the statutory rights in issue, "discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes," an agreement to arbitrate must be enforced under the FAA. *Gilmer*, 500 US at 26 (quoting *Mitsubishi*, 473 US at 628). Here, neither the FAA nor the Michigan Civil Rights Act contain any such express exclusion of civil rights claims from arbitra-

tion. Plaintiff's express written agreement that she "agrees to conform" to the employer's policies and procedures in the employee handbook constitutes a sufficiently enforceable agreement under the FAA.

1.

Section 2 of the FAA provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 USC § 2.

Section 2, by its terms, contemplates agreements to submit future disputes to arbitration, such as the age discrimination dispute in *Gilmer*. There, the plaintiff had acknowledged, on a securities registration form with the New York Stock Exchange (where registration with the NYSE was required by his employment), that he would submit any controversy required to be submitted to arbitration by the NYSE Rules. One of those rules so incorporated by reference was NYSE Rule 347, requiring the arbitration of all disputes arising out of employment or the termination of employment. Like plaintiff Gilmer, plaintiff here signed an acknowledgment (on a form other than her employment application, *i.e.*, on the tear-off sheet at the back of the employee handbook) that she would abide by present and future policies and procedures of the employer, including an arbitration procedure containing a broad arbitration clause sweeping within its ambit all employment disputes relating to dismissal (reserving only the equitable powers of the circuit court consonant with the Michigan arbitration statute, see, MCL § 600.5035).

Given the broad definition of the term "involving commerce" as "affecting commerce" by this Court in *Allied-Bruce*, *supra*,

and given this Court's holding in *Gilmer* that an acknowledgment on a securities registration form constituted an agreement to arbitrate all employment disputes within Section 2 of the FAA, this Court should find that plaintiff's written acknowledgment also falls within that section.

2.

Plaintiff's written agreement that she would abide by all present and future employer policies and procedures, including the arbitration provision in the employee handbook, constitutes an enforceable agreement to arbitrate under the FAA. Even an agreement to arbitrate discrimination claims allegedly *unilaterally imposed by the employer as a condition of employment* is enforceable under the statute.

In *Gilmer*, as noted above, the Supreme Court enforced an arbitration provision in a securities registration form which the employee was required to sign as a condition of employment, for Gilmer's employment required him to become licensed by a national stock exchange. Following *Gilmer*, the Ninth Circuit rejected the argument offered by plaintiff and her amici that an employer cannot unilaterally impose, as a condition of employment or a condition precedent to employment, an agreement to submit all claims, including statutory claims, to arbitration/ADR. The *Saari* Court specifically rejected the plaintiff's argument that the judicial proceeding described in the federal Employee Polygraph Protection Act (the "EPPA") was exclusive, and held that the EPPA's express prohibition against a prospective waiver of rights *and procedures* did not render unenforceable the employer's unilateral imposition of an arbitration agreement covering all claims as a condition of employment, just as similar anti-waiver prohibitions in the federal anti-trust acts and in RICO did not preclude enforcement of agreements to resolve such claims in an arbitration, rather than a judicial proceeding. 968 F2d at 881-882.

The federal courts recognize that such agreements to arbitrate may appear in employee handbooks which employees acknowledge receiving, as in the case at bar. In *Nghiem* v *NEC Electronic Inc*, 25 F3d 1437 (CA 9, 1994), the Ninth Circuit re-

jected plaintiff's arguments that he did not knowingly and willingly submit his employment disputes to arbitration, where he acknowledged receipt of an employee handbook providing that all employment disputes would be subject to arbitration. There, plaintiff claimed that he had only invoked the arbitration procedure because the Company told him to do so. He also claimed that he had refused to sign a modification of his employment agreement because it contained a binding arbitration clause. In part because he had signed written acknowledgments of receipt of the Company handbook providing a four-step resolution process for employee complaints, the Ninth Circuit held that his employment discrimination claims under Title VII and state law were subject to arbitration. Although plaintiff's amici cite the Ninth Circuit case of *Prudential* v *Lai*, 42 F3d 1299 (CA 9, 1994), for the proposition that a pre-hire agreement to arbitrate prospective claims is not enforceable, the *Lai* case is distinguishable from the *Nghiem* case. The handbook in *Nghiem* provided for arbitration of all employment disputes in an employee handbook, as does the Company handbook here. The U-4 form and the employment contract in *Lai*, as the Ninth Circuit noted, "did not even refer to employment disputes" or cover such disputes.

Again, in *Degaetano* v *Smith Barney, Inc*, 1996 WL 4426 (S.D.N.Y. 2/5/96), plaintiff (as here) signed an agreement providing that she must observe the employer policies and procedures that the employer would from time to time establish, and she received a series of employee handbooks containing dispute resolution procedures for all employment disputes. Alleging constructive discharge due to environmental sexual harassment, plaintiff sued the employer for alleged violations of Title VII and the New York Human Rights law, and she sued the alleged harasser under the common law for intentional infliction of emotional distress. She then refused the employer's demand to submit to arbitration. As does plaintiff Heurtebise, plaintiff Degaetano claimed that she had no idea what she was signing when she signed the agreement, and that she had not therefore made a knowing and voluntary waiver of her "right" to a judicial forum. Rejecting the *Lai* Court's holdings and

noting that other courts similarly disfavored the *Lai* decision, the *Smith Barney* court distinguished *Lai* on the ground that the *Lai* agreement did not expressly reference employment disputes. Moreover, the court noted that in *Smith Barney*, as here, the agreement required plaintiff to acknowledge that she agreed to conform to the employer's policies and procedures, as described in the handbook. As the court noted, given plaintiff's signature signifying her agreement, "under ordinary state-law principles that govern the formation of contracts, . . . plaintiff's claim that she did not knowingly sign the Agreement is to no avail." *Id.* at 7-8.

In the following post-*Gilmer* non-union employee cases, the courts have dismissed lawsuits and required arbitration of a wide variety of claims, including those asserting discrimination arising under federal and/or state law: *Benefits Communications Corp* v *Klieforth*, 642 A2d 1299 (DC Cir 1994) (noting that every federal circuit court of appeals addressing the issue has extended the *Gilmer* holding to employment discrimination claims brought under Title VII); *Bender* v *AG Edwards & Sons, Inc*, 971 F2d 698 (CA 11, 1992) (holding Title VII claims subject to compulsory arbitration); *Alford* v *Dean Witter Reynolds Inc*, 939 F2d 229 (CA 5, 1991) (same); *Corion Corp* v *Chen*, 964 F2d 55 (CA 1, 1992) (leaving undisturbed the lower court holding that plaintiff was entitled, under the FAA, to arbitrate his discharge based upon company policy specified in the employee handbook); *Mago* v *Shearson Lehman Hutton Inc*, 956 F2d 932, 935 (CA 9, 1992) (holding Title VII claims held to be arbitrable even with regard to pro per plaintiff); *Didonato* v *AG Edwards & Sons Inc*, 65 FEP Cases (BNA) 1207 (ND Cal 1994) (holding that broad and inclusive arbitration clause in former employee's employment application compels dismissal of her action under Title VII and state tort law for sexual harassment, and rejecting plaintiff's contentions that she did not realize or intend that arbitration provision would require arbitration of claims for sexual harassment claims, that arbitration would deny plaintiff's constitutional right to jury trial, and that arbitration frustrates policies underlying Title VII); *Lockhart* v *AG Edwards & Sons*,

65 FEP Cases (BNA) 5, 6 (D Kan 1994) (holding Title VII claims arbitrable); *Edwards* v *ITT Financial Services*, 65 FEP Cases (BNA) 543 (ND Cal 1993) (holding that broad arbitration clause in employment agreement covering all disputes and claims between employer and employee mandates submission of race discrimination claims to arbitration); *Crawford* v *West Jersey Health Systems*, 847 F Supp 1232 (D NJ 1994) (enforcing arbitration provision as to age and sex discrimination claims brought against the company and individual defendants); *Williams* v *Katten, Muchin & Zavis*, 837 F Supp 1430 (ND Ill 1993) (holding sex discrimination claims arbitrable); *Hull* v *NCR Corp*, 826 F Supp 303 (ED Mo 1993) (holding that FAA applied that arbitration provision contained in individual employment contract was broad and to be liberally construed, that plaintiff's Title VII, ADEA ,and state law discrimination claims were to be arbitrated); *Scott* v *Farm Family Life Insurance Co*, 827 F Supp 76 (D Mass 1993) (holding federal and state sex discrimination, contract and tort claims arbitrable under the FAA); *Nazon* v *Shearson Lehman Bros Inc*, 832 F Supp 1540 (SD Fla 1993) (holding sex discrimination claims arbitrable); *Fletcher* v *Kidder Peabody & Co*, 81 NY 2d 623, 619 NE2d 998, 601 NYS 2d 686, *cert. den.*, 114 S Ct 554, 126 L Ed 2d 455 (1993) (holding race and sex discrimination claims arbitrable); *Harrison* v *Salomon Bros Inc*, 156 Misc 2d 341, 593 NYS 2d 439 (1992) (holding sex discrimination claims arbitrable); *Dancu* v *Coopers & Lybrand*, 778 F Supp 832 (ED Pa 1991), *aff'd*, 972 F2d 1330 (CA 3, 1992) (agreement to arbitrate prospective disputes enforced as to ADEA claim); *DiCrisci* v *Lyndon Guar Bank of New*, 807 F Supp 947 (WD NY 1992) (enforcing arbitration agreement as to Title VII and state law gender discrimination and sexual harassment claims where, as here, arbitration provision broadly submitted any employment dispute (including prospective disputes) to arbitration, *and even where (unlike here) arbitration provision limited remedies otherwise available under the discrimination statutes*).

Thus, under the FAA, unilaterally imposed agreements to arbitrate discrimination claims, even those entered into as a condition of employment, must be enforced.

II.

THE MICHIGAN DECISION MUST BE VACATED BECAUSE IT CONTRADICTS PRINCIPLES OF ARBITRATION AGREEMENT FORMATION UNDER MICHIGAN STATUTORY LAW.

Contrary to the decision of Michigan's highest court, enforcing plaintiff's written agreement to arbitrate would have effectuated Michigan's long-standing public policy favoring the arbitration of disputes, as codified in the Michigan Arbitration Act, MCL § 600.5001 *et seq.* (the "MAA"). The Michigan public policy in favor of arbitration reposes in an express statute providing that private arbitration agreements are valid, enforceable, and irrevocable "save upon such grounds as exist at law or in equity for the rescission or revocation of any contract," MCL § 600.5001. Michigan courts other than the *Heurtebise* court have recognized that statutory public policy and have liberally construed arbitration clauses, with all doubts resolved in favor of arbitration. *Riley* v *State Farm Auto Ins Co*, 420 F2d 1372 (CA 6, 1970), *cert den*, 339 US 928 (1971); *Northland Ins Co* v *Sny*, 98 Mich App 507; 296 NW2d 292 (1980).

The lead opinion in the *Heurtebise* decision, in which all justices joined, states that the MAA requires a binding contract [App. A-8, fn. 8], but concludes based on at-will disclaimer language and a reservation of rights to change clause that Reliable did not intend to be bound by the handbook's terms, thus negating any "contract." The *Heurtebise* court provided no analysis for its erroneous "footnote holding" that the handbook was not an enforceable contract under the MAA. The court never even addressed the issue of whether Heurtebise's signed written agreement to abide by Reliable's policies and procedures (including the arbitration provision) constituted an enforceable arbitration agreement under Michigan statutory arbitration law. Reliable again argues that the arbitration procedure at issue comports with the requirements of statutory agreements to arbitrate under the MAA,

MCL § 600.5001(2). The express written agreement is not a collectively bargained agreement falling within the exception to that Act. Moreover, the procedure provides on its face that the decision of the arbitrator is intended to be enforceable in any court of competent jurisdiction, or, at the very least, exhaustion is required as a condition precedent to the institution of any legal proceeding. Such language is sufficient to bring the arbitration agreement within the language of Michigan's arbitration statute. *Gordon Sel-Way* v *Spence Bros*, 438 Mich 488, 495; 475 NW2d 704 (1991); *DAIIE* v *Gavin*, 416 Mich 407, 417; 331 NW2d 418 (1982); *E E Tripp Excavating Contractor, Inc* v *Jackson County*, 60 Mich App 221, 236-237; 230 NW2d 556 (1975).

Nor is plaintiff's contention that she did not knowingly or voluntarily enter into any agreement to arbitrate civil rights claims persuasive, where she is presumed to have read what she has agreed to abide by under long-standing Michigan precedent. See, *e.g.*, *Scholz* v *Montgomery Ward, Inc*, 437 Mich 83, 91-92; 468 NW2d 845 (1991); *Reid* v *Sears, Roebuck and Co*, 790 F2d 453, 461-462 (CA 6, 1986); *Sponseller* v *Kimball*, 246 Mich 255, 260; 224 NW 359 (1929). Her negligence in failing to read and/or to comprehend the agreement which she signed does not excuse her from the agreement: that she "agreed to conform" to the policies and procedures of the employer as embodied in the handbook. So in *Christy* v *Kelly*, 198 Mich App 215; 497 NW2d 194 (1992), the Court of Appeals held that, under the MAA, a trustee's failure to read or to comprehend the agreement to arbitrate which he signed did not constitute a defense to the agreement.

The Michigan Supreme Court required a "contract" to arbitrate, even though the Michigan Legislature did not require in the MAA that there be a signed bilateral contract, but merely an "instrument in writing." MCL § 600.5001(1). On appeal to the Michigan Supreme Court, Heurtebise unfairly attempted to construe the MAA in a manner so that any agreement to arbitrate *prospective* disputes would require a somewhat higher quantum of proof of "contract" than an agreement to arbitrate disputes in being at the time of entry into the agree-

ment. That the Legislature apparently used the terms "arising under," "thereafter arising," and "existing" (as well as the terms "agreement" and "contract") interchangeably may be discerned from MCL § 600.5001(2). Thus, to read the word "existing" in sub-section 1 to mean "prospective," rather than "arising," does violence to the structure and intent of that sub-section, which merely recites that parties who are competent under the law may submit any dispute "arising between" them to arbitration by agreeing to do so in an "instrument in writing." Moreover, Michigan appellate courts have permitted "instruments in writing" under the MAA involving prospective claims with less than exists in the case at bar, where plaintiff at least signed her acknowledgment that she would abide by employer policies. In *Ehresman* v *Bultynck & Co*, 203 Mich App 350; 511 NW2d 724 (1994), the Michigan Court of Appeals refused to excuse from the operation of arbitration agreements a plaintiff who discovered that he had not signed the agreements and argued that the statute required a signed agreement by the party resisting arbitration.

To the extent that this Court feels that a written instrument in writing is required under the MAA, then plaintiff's written acknowledgment signifying her agreement to the procedures in the handbook constitutes a writing sufficient to withstand the Michigan Statute of Frauds, where there is no additional consideration for the agreement other than continued employment, but it has been signed by the party charged with the agreement or promise. *Scholz, supra;* MCL § 566.1.

III.

THE *HEURTEBISE* DECISION CONTRADICTS MICHIGAN COMMON-LAW PRINCIPLES OF EMPLOYMENT CONTRACT FORMATION AND MUST BE VACATED AS CONFLICT PREEMPTED.

The Michigan Supreme Court failed to apply its own prior decisions and well-settled principles of Michigan common law under which unilaterally established arbitration/ADR proce-

dures are enforced, where (as here) plaintiff simply abandoned arbitration procedures and haled the employer into court.

In *Toussaint* v *Blue Cross and Blue Shield of Michigan*, 408 Mich 579, 624; 292 NW2d 880 (1980), and again in *Renny* v *Port Huron Hospital*, 427 Mich 415; 398 NW2d 327 (1986), the Michigan Supreme Court has announced the rule that employers may avoid the perils of jury review of allegedly wrongful discharge claims by providing for binding arbitration, just as the Company has done: "Additionally, the employer can avoid the perils of jury assessment by providing for an alternative method of dispute resolution. A written agreement for a definite or indefinite term to discharge only for cause could, for example, provide for binding arbitration on the issues of cause and damages." *Id.* at 427 Mich 432.

In *Toussaint, supra*, this Court held that written handbook policies create binding rights without a "meeting of the minds," a standard from which the *Heurtebise* court departed in order to invalidate the parties' arbitration agreement:

> "We hold that employer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, can be unilaterally amended by the employer without notice to the employee . . .

408 Mich at 614-15. See also, *In re Certified Question*, 432 Mich 438; 443 NW2d 112 (1989); *Carlson* v *Hutzel Corp of Mich*, 183 Mich App 508; 455 NW2d 335 (1990), lv den 437 Mich 493 (1991).

Michigan appellate courts have also recognized that, *even where the arbitration procedure is unilaterally established*, the procedure is an aggrieved employee's sole and exclusive remedy on the merits of her or his wrongful discharge dispute with the former employer. *Carlson* v *Hutzel Corporation of Michigan*, 183 Mich App 508, 515; 455 NW2d 335 (1990), app

den (1991); *Zeniuk* v *RKA Inc*, 189 Mich App 33; 472 NW2d 23 (1991); *Dahlman* v *Oakland University*, 172 Mich App 502; 432 NW2d 304 (1988). At the very least, where the employer agrees to submit review of its decision to a neutral fact-finder other than a jury and other than the decision-maker itself, the employee should utilize that review process. *Renny, supra*; *Fulghum* v *United Parcel Service*, 424 Mich 89; 378 NW2d 472 (1986); *Carlson, supra*; *Zeniuk, supra*.

Where, as here, the parties expressly agree to submit claims to an ADR procedure which ultimately results in arbitration, utilizes AAA procedural rules, and permits the parties to present proofs and to be represented by attorneys, then the parties may not contest *ab initio* in a court the merits of their dispute. See, *e.g.*, *F J Siller Co* v *City of Hart*, 400 Mich 578; 255 NW2d 347 (1977); *Breish* v *Ring Screw Works*, 397 Mich 586, 594, n 4; 248 NW2d 526 (1976).

For almost ten years, under Michigan employment law, it was well-settled that an employee who fails to invoke and/or to exhaust an arbitration procedure unilaterally imposed by the employer is barred from litigating the merits of her or his wrongful discharge claim in civil court: the only judicial review is limited to the issue of procedural fairness. *Dahlman, supra*. In order to determine that issue, the court may, as a threshold issue and as a matter of law, determine whether the procedure comports with principles of elemental fairness and due process. In fact in *Renny*, 427 Mich at 418 *authored by the same Justice who authored the Heurtebise decision*, the Michigan Supreme Court held that "where an employee has expressly consented to submit a complaint to a joint employer-employee grievance board established by the employer with the knowledge that the resulting decision is final and binding, the decision shall be final unless *the court finds as a matter of law* that the procedures did not comport with elementary fairness." The arbitration procedure in issue here culminates in binding arbitration by a neutral third-party arbitrator. See: *Vander Toorn* v *City of Grand Rapids*, 132 Mich App 590; 348 NW2d 697 (1984) app den. In contrasting the Port Huron Hospital procedure with arbitration procedures,

the *Renny* Court necessarily impliedly held that arbitration procedures, such as the AAA procedures expressly incorporated into the ADR Procedure at issue, are presumptively fair. 427 Mich at 433-436.

Under Michigan law, even public policy tort claims must be submitted to the ADR procedure, and that Heurtebise's failure to do so bars her public policy tort claim. See, *e.g.*, *Ryoti* v *Paine, Webber*, 142 Mich App 805; 371 NW2d 454 (1985) (public policy tort claim is arbitrable). Here, Heurtebise simply asserts a statutory tort claim, and there is no principled reason for treating such tort claims any differently, for purposes of forum selection, than common-law tort claims, apart from the now disfavored view that arbitrators are incapable of remediating employment discrimination claims.

By virtue of the separate agreement signed by plaintiff to become aware of and to abide by the procedures in the employee handbook, plaintiff was reasonably informed about the arbitration policy and procedure. It is undisputed that she signed the agreement, that she received a copy of the handbook at hire and termination, and that she voiced no objection to the procedure until after her discharge. Like the plaintiff in *Myers* v *Western Southern Life Ins Co*, 849 F2d 259 (CA 6, 1988), in which the Sixth Circuit enforced a waiver of the statutory statute of limitations, plaintiff was presumed to be well-informed of the agreement. Moreover, under Michigan law she had a duty to read the agreement and the handbook and to inquire about any contents which concerned her. *Scholz*, *supra*; *Reid*, *supra*; *Sponseller*, *supra*; *Christy*, *supra*. She could not simply remain silent and then claim that she did not knowingly or voluntarily assent to the procedure, particularly where she accepted the substantial benefits under the employee handbook, and where the handbook in its very introduction invited plaintiff and all employees of the Company to ask questions about any provisions which they did not understand.

The Restatement Second of Contracts also contemplates that continued performance without protest constitutes objective indicia of assent to the term or condition in issue.

Only where the offeror (here, the employer "unilaterally imposing" an arbitration agreement) has expressly stated that acceptance will be in a particular manner is the acceptance of the offer limited to that manner. See *Restatement Contracts*, 2d, § 30, comment a. Where acceptance is invited or suggested in a particular manner, that invitation does not preclude other means of acceptance. *Id.*, comment b. Section 50(b) of the Restatement Second also clearly recognizes acceptance by performance. Moreover, where the offer is one which can be construed to permit performance as acceptance, then performance does not constitute a manifestation of assent only if, within a reasonable time, the offeree notifies the offeror of non-acceptance. *Restatement Contracts*, 2d § 53(2). The offeree who remains silent while continuing to perform as the offer contemplated risks being bound if it is reasonable to assume from his conduct that he accepts the offer. *Id.*, comment b. Here, after receiving the acknowledgment form and the handbook containing the arbitration procedure, Heurtebise continued in the employ of the Company without protest, without coming forward as she was duty-bound to do under *Scholz*, and *without refusing any benefit of employment under the handbook*. Under those circumstances, as this Court has itself cautioned, an arbitration provision in a handbook should not be held unenforceable while all of the handbook provisions which benefited plaintiff are enforced. *Allied-Bruce*, *supra*. See also: *Batchelor* v *Sears, Roebuck & Co*, 574 F Supp 1480, 1484 (ED Mich 1983) (employee bound by both benefiting and burdening provisions in same handbook). Over time, as a result of Heurtebise's ratification by conduct, as a matter of law, the privilege of silence should fall away, continued performance and receipt of substantial benefits should be deemed as an objective manifestation of assent, and plaintiff should be estopped from denying her agreement to the arbitration policy and procedure described in the handbook which she received simultaneously with her acknowledgment.

IV.

THE MICHIGAN SUPREME COURT DECISION IMPAIRS CONTRACTS AND DENIES EMPLOYERS EQUAL PROTECTION.

In according an agreement to arbitrate statutory civil rights claims suspect status by requiring greater elements of contract formation for such agreements than under its own theories of employment contract formation when such theories benefited employees, rather than employers, the Michigan Supreme Court engaged in impermissible impairment of contracts in violation of Article I, § 10 of the Federal Constitution. By holding such agreements up to stricter standards of contract formation when an employer (in *Heurtebise*), as opposed to an employee (as in *Renny, supra*), sought to enforce a handbook provision which for years the very same court had permitted to be enforced by employees with no meeting of the minds or mutual assent, the court also treated similarly situated parties, *i.e.*, employees and employers seeking to agree upon terms and conditions of employment (including but not limited to arbitration procedures), in a disparate manner in violation of the federal constitutional guarantee of equal protection contained in the first section of the Fourteenth Amendment.

Corporations like Reliable, who are employers, are also persons for purposes of enforcing certain constitutional guarantees, such as the right to enjoy the benefits of a contract without impairment and the right to equal protection under the laws. See, *e.g.*, *Metropolitan Life Ins Co* v *Ward*, 470 US 869 (1985).

Where a state, here through its highest supreme court, promulgates a law which adversely affects the enforcement of an arbitration agreement, then that state has violated the constitutional prohibition against state action which impairs contract obligations enjoyed by private citizens, including corporate citizens. *Allied Structural Steel Co* v *Spannaus, Minn.*, 438 US 234 (1978); *Detroit United Railway* v *Michigan*, 242 US 238 (1916). As discussed above, given the cavalier manner in which Michigan's highest court chose to sidestep the thresh-

old issue of enforcement of an arbitration agreement under the FAA, and given the court's willingness to contravene its own prior decisions enforcing handbook provisions without mutual assent and its willingness to ignore the employee's express written agreement to abide by all employer policies and procedures, the arbitration agreement into which Reliable entered in order to have a less costly and more expeditious means of resolving employment disputes where former employees sought money damages was substantially impaired. *Id.* The *Heurtebise* opinion effectively vitiates, not only Reliable's arbitration agreements with its employees, but also the arbitration agreements of other Michigan employers who have successfully resolved employment disputes through arbitration, particularly where the Michigan Supreme Court refused to apply its newly announced principles of arbitration agreement formation prospectively. See App. pp. A-67–A-70, Riddle aff.

Moreover, where a state treats persons essentially similar (*i.e.*, the parties to an arbitration agreement on a record devoid of any fraud or duress or adhesion) in a disparate manner, by penalizing one but not the other for seeking to enforce handbook provisions, and by permitting the enforcement of handbook provisions which benefit the employee (both on remand to a finder of fact as a measure of damages or as proof of the right to be reinstated, and during employment as a "promise" of certain compensation and benefits) but not those which arguably may benefit the employer (the arbitration provision), then the equal protection clause has been violated. The Michigan Supreme Court in effect accorded the arbitration provision of the employment agreement suspect class status, without any rational basis therefor and despite the strong national policies against doing so. In the past, without any meeting of the minds, as discussed above, the Michigan Supreme Court has enforced handbook provisions providing for compensation, benefits, and job security terms. To fail to enforce an arbitration provision in an employee handbook on the ground that there was no mutual assent or meeting of the minds subjects employers, but not

employees, to separate standards for contract formation with no rational basis for such standards.

Under these circumstances, Reliable and all other Michigan employers have been deprived of their rights to enjoy the benefits of contract and to enjoy equal protection of the laws.

CONCLUSION

For reasons discussed above, petitioner Reliable Business Computers, Inc., respectfully requests that this Court grant its petition for certiorari, vacate the decision of the Michigan Supreme Court and either a) remand this matter to that Court with instructions to reinstate and affirm the Michigan Court of Appeals decision; b) remand this matter to the Michigan Supreme Court for reconsideration on the issue of whether the parties' agreement to arbitrate should be enforced under the FAA, the MAA, and/or principles of Michigan employment law relating to employment contract formation in light of *Doctor's Associates*, *supra*, *Volt*, *supra*, *Allied-Bruce*, *supra*, *Perry*, *supra*, *Prima Paint*, *supra*, *Southland Corp*, and *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974); or c) grant plenary consideration on any or all issues raised herein.

Respectfully submitted,

VERCRUYSSE METZ & MURRAY

By: /s/ DIANE M. SOUBLY (P32005)
Counsel of Record

/s/ ROBERT M. VERCRUYSSE (P21810)

Attorneys for Petitioner

31780 Telegraph, Suite 200
Bingham Farms, MI 48025
(810) 540-7019

Dated: December 13, 1996